In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1001

NATIONAL STARCH PRODUCTS, INC., PETITIONER

v.

UNITED STATES (INDEX INDUSTRIAL CORP., PARTY IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This action was brought in the United States Customs Court by petitioner, an American producer of a wood product known as "particle board", under the provisions of Section 516(b) of the Tariff Act of 1930, as amended, 19 U.S.C. 1516(b). The basis of the suit was that the Collector of Customs had erroneously classified importations of particle board as "wallboard", dutiable under paragraph 1402 of the Act, as modified, at the rate of 5 per centum, ad valorem. Petitioner's contention was that the im-

portations should have been classified as manufactures wholly or in chief value of a product of which any synthetic resin or resin-like substance is the chief binding agent, dutiable under paragraph 1539(b), as modified, at the rate of 21 cents per pound and 17 per centum ad valorem.

The Customs Court sustained petitioner's position, and on May 18, 1962 the Court of Customs and Patent Appeals affirmed. On rehearing, however, the latter court withdrew its opinion of affirmance and on December 12, 1962 filed a new opinion, unanimously reversing the judgment of the Customs Court. The basis of its ruling was (1) that petitioner had the burden of establishing both the propriety of its asserted classification and the erroneousness of the classification applied by the Collector of Customs; and (2) that petitioner had failed to meet the first part of this dual burden.

The United States did not actively participate in the proceedings in either of the courts below and did not itself appeal from the judgment of the Customs Court. In the case of protests filed by American producers under Section 516(b) of the Tariff Act, the importer of the merchandise in issue has a statutory right to appear and be heard as the party in interest. Section 516(c), 19 U.S.C. 1516(c). Here, the importer (respondent Index Industrial Corporation) exercised this right in the Customs Court and took the appeal from the adverse decision of that court. In the opinion of the Department of Justice, the position of the Government was being adequately presented by the party in interest and, therefore, it

was not necessary for the Department itself to participate.

We believe, however, that, in connection with the pending petition for certiorari, this Court may wish a brief statement of the reasons why, in the Government's view, this case is inappropriate for review by this Court.

1. The ultimate question as to the appropriate classification of the particle board here involved is narrow, of no general importance, and particularly suitable for final resolution by the specialized courts charged with the responsibility for the interpretation of the Tariff Act. Moreover, the question is of no prospective significance since both of the competing paragraphs were repealed by Section 101 (a) of the Tariff Classification Act of 1962, 76 Stat. 73. The new dutiable list provided by that Act contains a specific designation for wood particle board.

2. There is no substance to petitioner's contention that, in an action under Section 516(b) of the Tariff Act, the American producer need establish only that the classification utilized by the Collector was erroneous. As petitioner correctly recognizes, an importer who files a protest against the Collector's classification must additionally establish that the classification upon which it relies is correct. There is no reason for attributing to Congress an intent that the American producer's burden should be less.

In this regard, petitioner's reliance on the terms of Section 516(b) is clearly misplaced. As a condition precedent to filing a protest in the Customs Court, the American producer must file a complaint

with the Secretary of the Treasury, setting forth, *inter alia*, "the classification, and the rate or rates of duty he believes proper, and the reasons for his belief." It is scarcely likely that Congress would have imposed this requirement had it deemed the American producer's burden in the Customs Court, following the denial of the complaint by the Secretary, to be limited to a showing that the Collector's classification was in error.

There is a still more fundamental consideration requiring the conclusion that the American producer, in common with the protesting importer, must be held to the burden of establishing the appropriateness of a specific classification other than which was selected by the Collector. The gravamen of the American producer's complaint is perforce that the duties assessed against competing imported merchandise were too low; just as a suit by an importer necessarily is based upon the alleged exaction of excessive duties. The mere showing by the complaining American producer (or importer) that the Collector's classification was erroneous does not, however, in itself prove that higher (or lower) duties should have been assessed; this cannot be ascertained until the correct classification (and thus rate of duty) have been established. It is for this reason that this Court held in *Arthur* v. *Unkart*, 96 U. S. 118, upon which petitioner relies (Pet. p. 9), that the complaining importer must prove the applicability of a classification providing a lower rate of duty than that specified in the classification held applicable by the Collector. For the same reason, an essential element of the

American producer's proof is that the merchandise comes under a classification calling for a higher rate of duty than that imposed by the Collector.

3. Nor is there merit to petitioner's alternative contention that the court below erred in holding that it had failed to fulfill the burden of proving the applicability of paragraph 1539(b) to the particle board in issue. This contention is based principally upon the purported failure of the court to give effect to the settled principle that a presumption of correctness attaches to the Collector's classification of merchandise. See *e.g.*, *Arthur* v. *Unkart*, *supra*; *United States* v. *John A. Steer Co.*, 46 C.C.P.A. (Customs) 132, 134.

Contrary to petitioner's apparent belief, the presumption of correctness is directed solely to the decision of the Collector respecting the classification of the merchandise in issue; *viz.*, the administrative action under review. Here that decision was that the merchandise was classifiable as wallboard under paragraph 1402, because it was particle board of a type which, under prior Bureau of Customs rulings, was excepted from classification under paragraph 1539 (b). Far from relying on a presumption of the correctness of the Collector's conclusion, petitioner's entire case was based upon the assertion that that conclusion was erroneous.

As we have noted, to sustain its position (*i.e.*, to *overcome* the presumption of correctness attaching to the Collector's classification under paragraph 1402) petitioner had to establish, *inter alia*, the applicability of paragraph 1539(b) to the particular particle board

involved. To carry this burden, it was required to show affirmatively that the importation was, in the terms of paragraph 1539(b), a manufacture wholly or in chief value of any product of which synthetic resin is the chief binding agent. As the court below held, petitioner totally failed to establish that the importation was a "manufacture" of particle board (the "product"). This holding is not challenged by petitioner, which contends simply that it was not obligated to make the showing.

For the foregoing reasons, we believe that the petition should be denied.

Respectfully submitted,

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